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No. 83-652

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PAUL W. PETERSON,
Petitioner,

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,
and
TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,
SYSTEM DIVISION NO. 34 and TRANSPORTATION-COMMUNICATIONS
DIVISION, BROTHERHOOD OF RAILWAY, AIRLINE
AND STEAMSHIP CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION EMPLOYEES,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENT BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, IN OPPOSITION

STEPHEN W. SKRAINKA
(Counsel of Record)
100 North Broadway,
Suite 1800
St. Louis, Missouri 63102
(314) 421-4800

Attorney for Respondent Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees

(Additional attorneys listed inside front cover)

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

Alan B. Hoffman
Husch, Eppenberger, Donohue,
Elson & Cornfeld
100 North Broadway, Suite 1800
St. Louis, Missouri 63102

William J. Donlon, General Counsel
Brotherhood of Railway, Airline and
Steamship Clerks, Freight Handlers,
Express and Station Employees
3 Research Place
Rockville, Maryland 20850

QUESTIONS PRESENTED

1. Whether the District Court and the Court of Appeals correctly concluded that Petitioner, who twice had his grievances for wrongful disqualification and wrongful discharge adversely determined by the National Railroad Adjustment Board pursuant to the Railway Labor Act, Section 3, First, 45 U.S.C. § 153, First, was not entitled to relitigate those claims to a jury in the District Court?

2. Whether the District Court and the Court of Appeals correctly concluded that there were no genuine issues of material fact which would preclude summary judgment under Fed.R.Civ.P. 56 on Petitioner's claim of breach of duty of fair representation against his Union for failing to appeal his wrongful disqualification and wrongful disqualification grievances to the Board?

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OPINIONS BELOW

The per curiam opinion of the Court of Appeals (Pet. A. 1-6) is unpublished. The District Court's opinion (Pet. A. 22-39) is not officially reported. The decisions of the National Railroad Adjustment Board in Award 15924 (1967) and Award 22697 (1980) (Brief for Respondent C.&E.I. at Apps. D., C.) are also unpublished.

STATUTES INVOLVED

In addition to the statutes and rule set forth in the Petition (Pet. A. 85-90), there is involved herein Section 3, First (j) of the Railway Labor Act, 45 U.S.C. §153, First (j):

> (j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

STATEMENT OF THE CASE[1]

Petitioner, Paul W. Peterson, was employed as a telegrapher by the Respondent, Chicago and Eastern Illinois Railroad (now merged with the Missouri Pacific Railroad Co. and referred to herein as "Railroad" or "C.&E.I.") from 1945 to 1965. On December 23, 1964 he was disqualified from the post of first shift operator at the Wansford Yard near Evansville, Indiana on grounds that he failed properly to fulfill the duties of the position by repeatedly delaying transmission of the consist reports to the Chicago office. Petitioner had been advised that the consist report for two daily trains should be given priority. The consist report is an itemized description of the cars on a train, listing car numbers, contents, destination, shipper and consignee. This information was needed daily in Chicago in order for the Railroad to advise consignees of the whereabouts of their shipments (R. 410-11, Admission No. 1, S.A.U. 2, 22).

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[1] Except as indicated the facts are as stated by the Court of Appeals (Pet. A. 2-4). References to A. and S.A.U. are to the Appendix and the Union's Supplemental Appendix in the Court of Appeals. R. refers to the record before the Adjustment Board leading to the 1980 Award, Docket No. MS-22343, Award 22697. App. refers to the Appendices to this brief. Pet. A. refers to pages of the Appendices to the petition for certiorari.

Peterson admitted he was warned prior to his disqualification "to telegraph these train consists promptly to Chicago or get off the job" (Admission No. 2, S.A.U. 2, 32). At that time Peterson was represented by The Order of Railroad Telegraphers whose General Chariman, M. J. Hayes was located in Edwardsville, Illinois, and whose President and International offices were located in St. Louis, Missouri (S.A.U. 18, 23).[2]

Peterson requested an immediate hearing on the disqualification and one was scheduled for January 4, 1965 but then, at the request of the Union, was postponed in an attempted settlement (Admission Nos. 10, 13-17, S.A.U. 3-4, 33). The Railroad offered Peterson a letter agreement which would have given him the right to return to his position on condition that the Railroad had the right to remove him if his performance continued to be unsatisfactory. Mr. Hayes negotiated a revision, but Peterson rejected the revised letter without consulting him (Admission Nos. 20-23, S.A.U. 4, 33). After the failure of these settlement efforts, a hearing was held on January 11, 1965 near Chicago, at which Peterson was represented by the Union. His disqualification was nevertheless affirmed by the Railroad. Thereafter, the Union filed a grievance, which was denied; the denial was appealed successively up to the chief operating officer of the Railroad authorized to handle this dispute, who again denied it.

General Chairman Hayes then submitted the disqualification case to the Union Claims Department in St. Louis for evaluation and possible appeal to the Board. On May 5, Union President, George Leighty advised General Chairman Hayes by letter that the disqualification claim had been reviewed and was being returned to him to attempt to settle the matter on the property

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[2] During the pendency of this dispute, the Union was renamed The Transportation-Communication Employees Union, subsequently merged into the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, and is referred to herein as the "Union".

because "...this case will fail before the Adjustment Board" (App. A, para. 7). On May 14, 1965, General Chairman Hayes advised Mr. Peterson by letter (App. D) that the file had been returned to him from the St. Louis office because the Claims Department and the Union president "didn't believe the case had sufficient merit for submission to the Adjustment Board". Hayes pointed out the alternative was to approach management for leniency. He asked Peterson to advise him whether he would be willing to sign the original settlement agreement or whether he would be willing to work any position on the Railroad other than first shift telegrapher at Wansford. Peterson never responded to this letter (App. D.; Admission Nos. 49, 50; S.A.U. 8, 34).

In the meantime, while the disqualification claim was being appealed, Peterson was instructed by the Railroad to perform other duties. Although warned by Hayes and personally aware of the probable consequences of this action, he refused (App. C; R. 716-721). He did not return to work, despite several instructions to do so. He refused to bid in the job of third shift telegrapher at Wansford Yard (Admission No. 32, S.A.U. 5, 33). He also refused to submit medical evidence of his inability to work. Consequently, a dismissal hearing took place on April 9, 1965 (Pet. A. 29). Peterson did not advise the Union of this hearing or ask it to represent him. He represented himself. During the course of the hearing he advised the hearing officer that he refused to work any position for the Railroad other than first shift telegrapher at Wansford and that he was not sick, except "sick at heart" (Pet. A. 29). On April 15, 1965, he was dismissed by the Railroad for failure to report to work. In May 1965, the Union grieved his dismissal, seeking reinstatement and backpay for him. The grievance was not resolved, however, and it was appealed without success to the highest railroad officer authorized to handle such disputes.

Thereafter, General Chairman Hayes referred the claim to the Union Claims Department in St. Louis for further handling

(App. A, para. 8). On January 26, 1966 Union President Leighty advised General Chairman Hayes by letter that he was returning the file because "...I have reached the decision that we could not successfully prosecute this claim with the Adjustment Board" (Exhibit B to App. A.). Two days later General Chairman Hayes wrote Peterson that the Union had decided not to appeal his claim to the Board. He advised Peterson that the Union had concluded that this grievance lacked merit and would not be successful before the Board. He further advised Peterson that he could appeal his claim individually by May 8, 1966 (App. D.). Under the collective bargaining contract governing Peterson at that time, any claim appealed to the Board was required to be initiated by the employee or his representative within nine months of denial of the grievance by the Railroad. On May 5, 1966, Peterson appealed the denial of both grievances to the Board. In 1967, the Board denied the disqualification claim on the grounds that the appeal was not timely filed, and the dismissal grievance was denied on the merits (Brief of Respondent C.&E.I. at App. D.).

On July 11, 1968, Peterson appealed these denials to the District Court, and subsequently added five additional, amended counts. By 1971, Count I of the "First Amended Petition" requested the Court to review and set aside the 1967 Award of the Board and sought relief from the railroad only. Counts II through V asserted common claims against both the Union and the Railroad for breach of duty of fair representation based primarily on the Union's failure to advise Peterson of the proper time limit on his disqualification claim. After extensive discovery and pre-trial proceedings, the District Court permitted the Union to be realigned as a plaintiff on Count I only and, after a two day hearing, on May 4, 1976, ordered the case remanded to the Board for a hearing on both claims, *de novo*, on grounds that the "arbitrary and uncertain appeal procedures" of the Railroad rendered the 1967 Board Award "arbitrary, capricious, actually and indisputably without founda-

tion in fact or reason and in violation of the statutory requirements of Sections 3, First (i) and (m)," 45 U.S.C. §§153,First (i) and (m) (Pet. A. 25, 32).

On January 11, 1980, the Board, including a neutral referee, entered a new award denying both the disqualification and dismissal grievances on their merits. (Brief for Respondent D.&E.I. at App. D.). Peterson then appealed again to the District Court. In granting both defendants' motions for summary judgment, the District Court noted:

> The exclusive, primary jurisdiction of adjustment boards established under the Act to determine the merits of grievances has long been established under federal law. *Slocum* v. *Delaware, Lackawanna & W. R.R.*, 339 U.S. 239 (1950). Congress amended the Act in 1966 to provide flatly that awards of the Board 'shall be final and binding'. 45 U.S.C. §153 First (m) (Pet. A. 30).

The Court held that Peterson had stated none of the statutory grounds required under Section 3, First (q), 45 U.S.C. 153, First (q) of the Act to furnish a basis for setting aside awards of the Board. After noting that Petitioner was entitled to a limited review of the record to determine that the requirements of due process were satisfied (Pet. A-27.) and reviewing the record before th Board, the Court found:

> There was ample testimony from [five witnesses] that plaintiff Peterson, whatever his technical telegraphy skills, was not fulfilling properly the duties assigned to him. Many testified that when Peterson was absent, the work was "cleared" and completed at an early hour of the morning, but that when he was on the job, the work was not finished. The testimony depicts an obstinate man whom telegraphers in other stations had difficulty accomodating. ... While this may or may not have been entirely true, it was for the Board to decide (Pet. A. 28-9).

For this reason, the Court concluded (Pet. A. 29) that the disqualification claim was not subject to further review. The District Court also concluded that there was more than ample evidence of Petitioner's refusal to return to work, following his disqualification, or to provide a valid reason for his failure to do so. For this reason, the Court also concluded (Pet. A. 29) that the dismissal claim was likewise not subject to further judicial review.

Turning to the fair representation claim, the District Court reviewed the correspondence and the affidavit of Dean T. Echols, an employee of the Union's St. Louis Claims Department who was familiar with Peterson's claims, which clearly shows that following its normal procedures the Union refused to appeal Peterson's disqualification claim in May 1965 and his dismissal claim in January 1966 solely because after review of the files and applicable precedents its officials believed these claims would fail before the Board (Pet. A. 36, App. A).[3]

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[3] Although they were dropped by the Union because it believed they lacked merit, Peterson's repeated failure to cooperate with the Union also clearly absolved it of any duty to continue processing his grievances. He rejected the January 1965 settlement Hayes had obtained without even consulting him. He refused to work any other position or present a doctor's excuse for his absence despite advice from Hayes in February 1965 that he would be dismissed if he did not do so (Admission Nos. 33, 36, 37, S.A.U. 5-6, 33). He did not advise Hayes or Burkhart of his scheduled dismissal hearing in April 1965 or request them to represent him (Admission No. 40, S.A.U. 6, 34). Nor did he advise Hayes of his April 15, 1965 dismissal (A. 169). In May 1965 he failed to respond to Hayes' urgent requests for guidance as to how to proceed to seek leniency on his disqualification (A. 173; Admissions Nos. 49, 50; S.A.U. 8, 34). As President Leighty observed, "We can't help him if he won't help himself" (A. 171). *See Ostrofsky* v. *United Steelworkers*, 273 F.2d 614, 615 (4th Cir.), *cert. denied*, 363 U.S. 849 (1960).

Peterson admitted that he knew of no reason for the Union's refusal to appeal his claims to the Board except a lack of belief in their merits (S.A.U. 66-71). The District Court concluded that "since there is no disputed issue of material fact, and plaintiff has failed to controvert in any way the affidavit and letters establishing union good faith, summary judgment for the union is proper" on the breach of duty of fair representation claims (Pet. A. 38).

The Court of Appeals affirmed, holding that only if Peterson had shown a breach of the Union's duty of fair representation could he avoid the bar of the arbitral process (Pet. A. 5). Reviewing Peterson's claims, the Court noted that "[t]he only colorable claim that the Union breached its duty to Peterson is based on the Union's failure to inform him of the correct deadline for an appeal of the disqualification grievance." Holding that this was "at most negligence" which would not support a breach of duty of fair representation claim, the Court noted that Peterson had obtained a new hearing before the Adjustment Board at which the Board then considered his disqualification claim upon the merits and denied it. "Thus the mistaken information which the Union conveyed to Peterson about the period for an appeal cannot be said in any way to have tainted the arbitral process" (Pet. A. 5-6).[4]

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[4] The "Statement of the Case" appearing at pp. 2-7 and extended in pp. A-40 to A-57 of the petition for certiorari is misleading in many respects. Petitioner Peterson has chosen to present a version of the "facts" based solely on conjecture and surmise, concocted ten years after the fact, in conflict with both unassailable documentary evidence and Peterson's own admissions, and rejected by both the District Court and the Court of Appeals.

REASONS TO DENY THE WRIT

I. The Supreme Court Does Not Sit Merely To Redetermine Facts.

All Petitioner Peterson seeks here is a fifth review of his grievances. He asks this Court to sift through this record to determine whether there is a "material issue of fact" sufficient to justify ignoring the Board's 1980 Award (Pet. i). Both the District Court and the Court of Appeals correctly concluded that the adverse 1980 Award of the Board barred Petitioner from relitigating his wrongful disqualification and wrongful discharge claims in the District Court. The exclusive jurisdiction of the Board over minor grievance disputes arising under railway labor contracts has long been established by this Court. *E.g., Slocum* v. *Delaware L. & W. R.R. Co.*, 339 U.S. 239 (1950); *Andrews* v. *Louisville and N. R. Co.*, 406 U.S. 320, 322 (1972). This Court has pointed out "time and again" that "Congress intended minor disputes of railway workers to be decided finally by the Railroad Adjustment Board." *Gunther* v. *San Diego and Arizona Eastern Railway*, 382 U.S. 257, 263-264 (1965); *accord Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89, 94 (1978). In Count I of his First Amended Petition, Peterson sought to have the 1967 Board award set aside and remanded to the Adjustment Board for a new hearing. With the assistance of the Union, on May 4, 1976, Peterson successfully obtained an order remanding his claims to the Adjustment Board for a completely new hearing. The only party who then objected to that order was Respondent C. & E. I. The District Court clearly contemplated that Peterson was to appear in person and by counsel, not with the Union as his representative (Pet. A. 37). Peterson made no objection to either the Court or the Board prior to receiving the adverse 1980 Award. The District Court thus correctly ruled that Peterson "cannot now complain that the very relief he requested was inherently unfair, especially where he has neither alleged not shown any particular facts to

support his bias allegation" (Pet. A. 37). *Krieter* v. *Lufthansa German Airlines, Inc.*, 558 F.2d 966, 968 (9th Cir. 1977); *United Steelworkers* v. *Smoke-Craft, Inc.*, 652 F.2d 1356, 1360 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982); *West Rock Lodge 220, International Association of Machinists and A.W.* v. *Geometric Tool Co.*, 406 F.2d 284 (2d Cir. 1968).

Not only were Peterson's objections to the finality of the 1980 award untimely, but both the District Court and the Court of Appeals concluded that they also did not meet the requirements of Section 3, First (q), 45 U.S.C. §153, First (q) which limit judicial review of Board awards to: (1) failure of the Board to comply with the Railway Labor Act; (2) failure of the Board to conform or confine itself to matters within its jurisdiction; and (3) fraud or corruption of a Board member. *Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89, 92 (1978) (Pet. A. 26-30, 4). Moreover, if a Board award is "actually and indisputably without foundation in reason or fact" or "wholly baseless and without reason," the award violates the constitutional requirements of due process and exceeds the Board's jurisdiction. *Kotakis* v. *Elgin, Joliet and Eastern Ry. Co.*, 520 F.2d 570, 574-75 (7th Cir.), *cert. denied*, 423 U.S. 1016 (1975); *cf. Thompson* v. *City of Louisville*, 362 U.S. 199 (1960) (conviction and punishment without evidence of guilt violates due process). Both the District Court and the Court of Appeals (Pet. A. 4) satisfied themselves that Peterson had not met any of these tests and that indeed the 791 page record which was amassed before the neutral referee of the 1980 Board contained, "to say the very least, more than enough evidence to show that there is foundation in both reason and fact for the Board's decision" (Pet. A. 28).

Petitioner's Seventh Amendment and Due Process contentions, belatedly raised for the first time in his petition for rehearing in the Court of Appeals (Pet. A. 8-19), are patently without merit. *Fidelity & Deposit Co.* v. *United States*, 187 U.S. 315, 319-321 (1902) (summary judgment does not violate the

Seventh Amendment); *cf. Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322, 336 (1979) (collateral estoppel does not violate the Seventh Amendment). The application of these well-established rules here raises no question requiring this Court's review.

II. There Is No Breach of Duty of Fair Representation Question Worthy of Review.

Regardless of the applicable legal standards the District Court and the Court of Appeals properly upheld the motions for summary judgment denying Peterson's claim of breach of duty of fair representation. As the Court of Appeals observed: "Most of these claims are wholly devoid of merit. . . . The only colorable claim that the Union breached its duty to Peterson is based on the Union's failure to inform him of the correct deadline for an appeal of the disqualification grievance" (Pet. A. 5).[5] However, the Court of Appeals concluded that even this claim was rendered moot when Peterson successfully persuaded the District Court to set aside the original Board award and remand the case for a *de novo* Board hearing without any time limit restrictions (Pet. A. 5,6).

Peterson presses his frivolous contentions that the second Board Award was tainted by the Union's continuing breaches of its duty of fair representation by its failure to represent him on

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[5] In fact the Union determined that Peterson's disqualification grievance lacked sufficient merit to warrant taking it to the Adjustment Board and informed him of its decision in May 1965 long prior to the deadline for Board filing (Apps. A, para. 7; D). Because of his own failure to respond to the Union's May 14, 1965 inquiry for advice as to further handling of the disqualification claim, however, the handling of this claim apparently became confused with the subsequent handling of the dismissal claim. Moreover, any possible error on the Union's part went only to the handling of the *disqualification* grievance, not the dismissal grievance. Since Peterson could have worked the third shift telegrapher's job at no loss in pay or benefits but refused to do so, he suffered no monetary damages from his disqualification (A. 37).

remand, by his own use before the Board of depositions adversely taken by the Union, and by the Union's opposition to his claims after he sued it (Pet. 6-7, 16, 18, 22, 25). Unions are not required to appeal each grievance to arbitration; rather, they are expected to evaluate and screen grievances based upon the assessments of their merit. *Vaca* v. *Sipes,* 386 U.S. 171, 191-193 (1967). Under the Railway Labor Act, Congress specifically provided that individuals may take their own grievances to the Adjustment Board. Section 3, First (i), (j), 45 U.S.C. §153, First (i), (j), *Bowen* v. *U.S. Postal Service,* ____U.S.____, 74 L.Ed.2d 402, 417 n. 18 (1983). While the Union desired to help Peterson obtain a full hearing before the Adjustment Board untainted by any time limit problem, it necessarily continued to oppose him on his breach of duty of fair representation claims in which he was seeking to hold it liable for $600,000 in damages and, therefore, could not represent him before the Board after the remand. Indeed, as the District Court observed, attempting to represent Plaintiff before the Board under these circumstances would have posed a "severe conflict of interest" (Pet. A. 37). *See Bowen* v. *United States Postal Service,* ____U.S.____, 74 L.Ed.2d 402 (1983). Petitioner's claim that he was prejudiced by the failure of the Union to represent him before the Board is belied by both the Congressional provision enabling him to appear in person and by counsel, 45 U.S.C. §3, First (j), and by the action of the Board on remand in deadlocking and requiring his case to be determined by a neutral, professional arbitrator. Peterson contends that the taking of "numerous depositions...at the insistence of the Union, the testimony of which was part of the record before the Board" prejudiced him (Pet. 22, 6). These depositions, taken by leave of court to perpetuate testimony in the event of a trial on the merits of the breach of duty of fair representation claims, were injected into the Board proceedings *by Peterson himself.* His original submission to the Adjustment Board leading to the 1980 award contained numerous extensive references to five of these depositions (R. 39-402). The

Railroad's original Board submission after remand contained no references to any depositions (R. 404-531). The Railroad did, quite naturally, refer to several depositions in its rebuttal, but only after Peterson had first introduced them into the proceedings. His complaint about the use of depositions is thus wholly disingenous. Peterson also complains that the Award should be vitiated because of the Union's opposition to his claim (Pet. 16, 24-25). As both the District Court and the Court of Appeals noted, the Union could hardly have done otherwise after it was sued for very substantial damages (Pet. A. 5, 37-8). However, the Union confined its opposition to the courtroom and did not oppose Peterson before the Board.

Moreover, "an order compelling arbitration should be viewed as one of the available remedies when a breach of the Union's duty is proved". *Vaca* v. *Sipes*, 386 U.S. 171, 196 (1967); *accord Stanton* v. *Delta Airlines, Inc.*, 669 F.2d 833 (1st Cir. 1982). Since Peterson's claim here required an understanding of long-standing railroad customs and practices, remand to the expert Board tribunal was peculiarly appropriate. Thus, although no breach of duty of fair representation was ever shown, Peterson received the same remedy to which he would have been entitled had he prevailed on his breach of duty claim. For all of these reasons, the issue Peterson tenders, a conflict among the circuits in the standard to be applied in measuring a breach of duty of fair representation against a claim of possible Union negligence (Pet. 26-29), is simply not presented by the record in this case. Moreover, a close reading of the cases Petitioner discusses (Pet. 26-29), indicates that while the articulation of the standard may differ slightly among the circuits, the cases are generally in harmony when analyzed according to their operative facts.

CONCLUSION

The petition for a writ of certiorari is totally devoid of issues of national importance and should be denied.

Respectfully submitted,

STEPHEN W. SKRAINKA
(Counsel of Record)
100 North Broadway, Suite 1800
St. Louis, Missouri 63102
(314) 421-4800

Attorney for Respondent,
Brotherhood of Railway, Airline
and Steamship Clerks, Freight
Handlers, Express and Station
Employees

Of Counsel:

ALAN B. HOFFMAN
Husch, Eppenberger, Donohue,
Elson & Cornfeld
100 North Broadway, Suite 1800
St. Louis, Missouri 63102

WILLIAM J. DONLON,
General Counsel
Brotherhood of Railway, Airline and
Steamship Clerks, Freight Handlers,
Express and Station Employees
3 Research Place
Rockville, Maryland 20850

November 14, 1983

APPENDIX

APPENDIX A

[Title and Caption Omitted]

AFFIDAVIT OF DEAN T. ECHOLS

(S. A. U. 36-42)
(Filed September 9, 1981
U.S.D.C. S.D. Ill.)

Dean T. Echols, being first duly sworn upon his oath, deposes and states as follows:

1. I have personal knowledge of the matters set forth in the following affidavit.

2. I am presently employed by the Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees. In 1965, I was employed by the Order of Railroad Telegraphers, which became known during that year as the Transporation-Communication Employees Union ("TCEU"), as a claims writer at the union offices in St. Louis, Missouri. In that capacity, I was responsible for the administrative processing of employee grievances and was familiar with the normal procedures followed by the union staff in processing grievances at that time. I was also directly involved in the handling of Paul W. Peterson's grievance in connection with his termination from employment by the Chicago and Eastern Illinois Railroad.

3. During 1965 and at the time of the pendency of the Peterson claim, the normal procedure for processing of such claims began with the receipt of a file from the general chairman within whose jurisdiction the grievance had arisen. The file was initially handled by the head of the TCEU union claims department, who at the time was Carl Presley, now deceased. The claims department head then assigned individual files to the claims writers on his staff, such as me.

4. Upon receipt of a file, the claims writer reviewed the facts in detail, and then consulted the union's index of awards rendered by the National Railroad Adjustment Board, to search for awards factually relevant to the particular grievance.

5. On the basis of the facts of the claim and the applicable decisions of the Railroad Adjustment Board, the claims writer evaluated the grievance and made his recommendations as to whether the matter appeared to have sufficient merit to warrant being submitted to the Adjustment Board. This recommendation was forwarded to the head of the claims department, and was subject to further discussion and review between the claims writer and the head of the department. The claims department head then forwarded the file to the President of the union for determination. In the regular handling of claims, it was customary for claims writers to prepare correspondence for the President's signature, on the basis of the President's determinations made after consultation with the claims writers and others in the claims department. The statements made in such correspondence accurately reflected the review of files by claims department personnel, and the basis for the determinations made by the President. It was further customary to make and keep file copies of all such correspondence, which copies bore the initials of the persons actually preparing same for the President's signature.

6. In the event the determination was made by the President of the union that the grievance did not have sufficient merit to warrant its presentation to the Adjustment Board, the file was returned to the general chairman, who was to advise the individual or individuals affected of the union's decision not to proceed and the reasons therefor, informing him of his right to personally submit his grievance to the Adjustment Board, and the time limit under the applicable agreement for doing so.

7. The files of the TCEU reflect that on March 11, 1965, the transcript of the hearing held January 11, 1965 on Paul Peterson's disqualification was forwarded to [illegible]. Leighty, then

President of the TCEU, by M.J. Hayes, General Chairman of System Division 34 of the TCEU, with an accompanying statement of the background of the claim, for determination and appeal to the Adjustment Board "if found to have sufficient merit." The files further reflect that the disqualification claim file was returned to M.J. Hayes with an accompanying cover letter by Mr. Leighty, dated May 5. 1965, which further instructed Hayes "to settle the matter on the property because this case will fail before the Adjustment Board." A copy of this letter is attached hereto as Exhibit "A". This copy bears the initials, "WIC," which were the initials of W.I. Christifer, indicating that the letter was actually prepared by him, after reviewing the file with the President.

8. Paul Peterson's claim for his dismissal from service was received on November 2, 1965, was assigned Claims Bureau File No. BU-11008-34, and was assigned to me for processing. It was thereafter handled in accordance with the normal claims procedure set out as above. The file was forwarded to Mr. Leighty with a recommendation that the grievance not be carried to the Adjustment Board. The reasons for this recommendation are set forth in a letter I prepared for the President's signature, addressed to M.J. Hayes, dated January 26, 1966. In accordance with normal procedure, the letter advised the general chairman to send Paul Peterson a letter advising Peterson of the union's decision not to proceed and of his right to proceed individually. A copy of this letter is attached hereto as Exhibit "B".

9. The Peterson claim was processed in accordance with the normal procedure applied to all claims in our office, and the recommendation that the grievance not be carried to the Adjustment Board was made after a careful review of all of the facts in the file, the applicable contract terms and the relevant Third Division precedents. I recommended that the claim not be handled further solely because of my opinion that it had no merit and that the Third Division would find that the carrier had shown just cause for discharge. The claims department head,

Mr. Presley, and the union President, Mr. Leighty, now both deceased, both accepted my recommendation because they agreed with my judgment of the likely outcome of any further appeal, and further believed that the best avenue for Mr. Peterson would be for him to allow us to request leniency from the carrier. There was no reason for my recommendation or their concurrence in it other than the evaluation of the merits of the claims and the probable futility of any further appeal to the Third Division of the Adjustment Board.

/s/ DEAN T. ECHOLS

[Notarization omitted]

EXHIBIT A

May 5, 1965

Mr. M.J. Hayes
General Chairman, Div. 34
1 Burton Place
Edwardsville, Illinois 62025

FILE: 400.1/34

Dear Sir and Brother:

Our telephone conversation May 3, re the Peterson case.

I have gone over the file carefully which had to do with Brother Peterson's removal from first shift at Wansford. I fail to see where any case has been made by Brother Peterson in his "battle royale" with Manager Cable.

I have to be frank. The disputed telegraphic business was in Brother Peterson's office and it was his responsibility to move it. He knew that it was subject to preferred handling. Apparently he developed the idea that Cable was goading him when he sought to clear him. The trouble with this kind of game is that in this instance Cable had the record of his efforts to work with Peterson. The delay in moving the business rests with the sending office unless he can conclusively prove that he made every effort to send it. Based on the trial record I don't believe the Adjustment Board will uphold Brother Peterson and, therefore, it behooves all concerned to take the necessary steps to get Brother Peterson back on the job.

On January 4 Brother Peterson was proffered an arrangement to continue on his first shift at Wansford, provided he would give attention to the proper handling of the work of his assignment, etc. The commitment would in no way impose any hardship on Brother Peterson, and it would have disposed of the issue probably for all time.

As matters now stand Brother Peterson is out of service and the immediate task is to get him back on a job — any old job — to preserve his railroad career. He has a family to think about and he had better start thinking about them and get off his high-horse. We can't help him if he won't help himself.

I am returning your file trusting that you will be able to settle the matter on the property because this case will fail before the Adjustment Board.

Fraternally yours,

/s/ G.E. Leighty

WIC:B

EXHIBIT B

January 26, 1966

Mr. M.J. Hayes
General Chairman, Div. 34
1 Burton Place
Edwardsville, Illinois 62025

Dear Sir and Brother:

This is in reference to your claim for payment of lost time and reinstatement of Brother P.W. Peterson.

The file discloses that the Carrier offered to restore Brother Peterson to service on his regular assignment under certain conditions. You and Brother Peterson objected to the conditions that, if in the future Brother Peterson failed to perform his work properly, he would be automatically disqualified. Carrier agreed to withdraw this condition from their offer, leaving only the condition that Brother Peterson cooperate with the Carrier.

Brother Peterson rejected the offer and consequently became an extra employee. Brother Peterson refused to assume his obligation as an extra employee. He advised the Carrier that he was sick and could not work. However, in the hearing Brother Peterson said he was not physically or mentally sick and was not under a doctor's care. He ignored Carrier's request that he submit evidence from his doctor that he was unable to work.

In recent Third Division Award No. 13467, the Referee in denying a similar claim said:

> "This claim lacks merit. Griffiths properly sought to be released from his commitment to cover the October 17 position, but was denied in his request. What does appear to be improper is his rapid change of reason for seeking to lay off. It is possible that his personal health so deteriorated in the interver ing three and one-half hours that he was legitimately unable to work the following day for physical reasons. But the evidence is so strongly convincing that Griffiths was fabricating a reason for excused absence as to support the Carrier's contention of malingering.
>
> This conclusion is amply supported by Griffith's testimony. He sent the first message himself yet acknowledged that he told his wife what to put on the second message and had her sign it. Furthermore, "though he claimed a sudden worsening of his condition with headaches and vomiting, he was apparently well enough to go out with his wife to send the afternoon message. Although the Carrier did not initiate a medical examination of Griffiths, in view of his own past record, the specific and emphatic denial by Counts of his request for layoff on financial grounds, and the alleged rapid deterioration of his health in the early afternoon, Griffiths would have been prudent to forestall the almost certain challenge of his position by obtaining medical support for his claim of illness. This he did not do."

Brother Peterson was asked in the hearing if he was now ready to return to work as a Telegrapher and work any job his seniority entitled him to work, with the exception of first trick at Wansford. Brother Peterson replied: "I am not." He also said in the hearing: "I will never work anything on the C&EI but first trick."

For reasons known only by Brother Peterson, he has refused to return to work on his regular assignment and has also refused to assume his obligation as an extra employee.

After thoroughly analyzing all the correspondence and evidence contained in the file, I have reached the decision that we would not successfully prosecute this claim with the Adjustment Board.

I suggest you send Brother Peterson a copy of Addendum A and advise him that he may handle the case to the Adjustment Board personally if he so desires. The time limit for submitting this claim to the Adjustment Board expires May 8, 1966.

I am returning your file under separate cover.

Fraternally yours,

/s/ G.E. Leighty

DTE:lb

APPENDIX B

(S.A.U. 29)

TRANSPORATION COMMUNICATION EMPLOYEES
UNION
SYSTEM DIVISION NO. 34

Edwardsville, Ill.
January 28, 1966

Mr. Paul W. Peterson,
R.R. 2
Boonville, Indiana.

Dear Sir & Bro:

This will constitute official notice to you of decision reluctantly reached, that the Transportation-Communication Employees Union (formerly The Order of Railroad Telegraphers), cannot further process your grievance, our claim BU-11008-34, against the Chicago & Eastern Illinois Railroad Company for reinstatement, for the following reasons:

> "The President of our Organization advises, after thoroughly analyzing all of the correspondence and evidence contained in the file, that it is his opinion that we could not successfully prosecute this claim with the Adjustment Board. His decision is based on the fact that you refused to accept an offer by the Railroad Company to restore you to the first shift position at Wansford Yards; and, on your refusal to work any other position claiming you were ill, yet you said at the hearing you were not physically or mentally ill and not under a doctor's care."

You are, however, permitted to personally process any further handling of your claim if you consider such action to be justified notwithstanding our views in the matter.

You are further informed that under Section 3 of the Railway Labor Act, as amended, you are authorizewd to individually submit your grievance to the Third Division of the National Railroad Adjustment Board for its consideration and disposition should you desire after first following all necessary preliminary procedure.

The above information concerning your rights as an individual in presenting grievances is communicated to you in order that you may take such action as you determine to be advisable within applicable time limits which expire May 10, 1966, necessary to protect your claim in view of the Organization's decision against further handling.

Fraternally yours

/s/ M.J. HAYES,
GENERAL CHAIRMAN.

APPENDIX C

(S.A.U. 18)

THE ORDER OF RAILROAD TELEGRAPHERS
SYSTEM DIVISION 34

Edwardsville, Ill.
February 23, 1965

Mr. Paul Peterson,
R.R. 2
Boonville, Ind.

Dear Sir & Bro:

I am enclosing a copy of the claim I submitted involving your case. It was appealed to Asst. Personnel Director Lyons on January 30, 1965, discussed in conference on February 8th, and declined in writing on February 16, 1965. I have written to inquire if a further conference would serve any useful purpose. In the meantime I am preparing the case for submission to the Adjustment Board, as I feel it is extremely unlikely that any settlement can be reached.

As I advised you at the beginning, a hearing wouldn't necessarily get your job back because if the management goes so far as to remove you from that job, they at least believe they can justify their action. Their position throughout has been that you could do the work if you would change your attitute and try to cooperate. If was for these reasons that I suggested your going to Chicago Heights to see if the difficulty couldn't be worked out.

I understand that when the company has called you to work that you have reported sick. If so, you probably will have to furnish evidence of it such as a statement from a Doctor, or they will charge you with "being absent without leave", and call a

hearing preparatory to dismissing you altogether. And, I rather expect you will have to undergo a physical examination before being permitted to work at all.

Of course, when your case is submitted to the Adjustment Board, there isn't anything else I can do until a decision is rendered. As for obtaining a favorable decision, it is probably no more than a 50% chance, as in these cases the Board's main concern is if the employee had a fair and impartial hearing. They don't ordinarily go into the reasons behind the carrier's action, since they have often said it is not their function to determine if the employee is capable of doing the work.

Therefore, unless you hear otherwise from me, you can assume the case has been submitted to the Adjustment Board, and it will be from one to two years before a decision is rendered.

Fraternally yours

M.J. HAYES,
GENERAL CHAIRMAN.

cc: R.V. Burkhart

APPENDIX D

(S.A.U. 21)

Claimant never would answer the questions below.

/s/ M.J. HAYES

TRANSPORATION COMMUNICATION EMPLOYEES UNION

Edwardsville, Ill.
May 14, 1965

Mr. P.W. Peterson,
R.R. 2
Boonville, Ind.

Dear Sir & Bro:

On March 11, 1965, I submitted your case for reinstatement to first trick position at Wansford, for further appeal and handling. However, on May 5, 1965, the file was returned to me with instructions to try and settle on the property, account the Grand Division didn't believe the case had sufficient merit for submission to the Adjustment Board.

Of course, the only other alternative is to approach the Management for leniency. Frankly, since you have said that you were not interested in working another position, I hardly know how to ask for leniency, especially since you were subsequently dismissed. It's a bit awkward, to say the least, to ask that an employee be returned to a certain position when he is no longer an employee.

Therefore, I would like to have the answers to the two following questions:

1. If the Management would consent to returning you to first trick Wansford, are you willing to sign the original conditional affidavit?

2. Are you interested in working any other position, if the management would consent to reinstating you on a leniency basis without compensation, but with all rights restored?

Please give me the answers to these questions promptly, so that a determination can be made as to future steps to take in further handling of your case.

Fraternally yours

M.J. HAYES,
GEN. CHAIRMAN.